



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: New Dimensions in Exercise, Inc.

File: B-238617; B-238618

Date: June 14, 1990

Jean Taylor, for the protester.
Daniel P. Murphy, Office of Procurement Grants Management,
and Thomas C. Komarek, Office of the Assistant Secretary for
Administration and Management, Department of Labor, for the
agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest challenging issuance of solicitation--on basis that an implied contract already existed for the same services--is dismissed as untimely where filed after the closing date for receipt of proposals.
2. Protest challenging the manner in which procurement was handled is dismissed as untimely where filed more than 10 working days after the bases of protest were known or should have been known.
3. Protest that awardee is not conforming with solicitation requirement for teaching aerobics for specified period per week is dismissed because it concerns an issue of contract administration which is not for resolution under the General Accounting Office's Bid Protest Regulations.
4. Protest that agency overlooked alleged staffing inadequacies in the awardee's proposal and thus insufficiently downgraded the proposal is denied where the agency's evaluation was reasonable and consistent with the solicitation, which did not specify any minimum acceptable staff size.
5. Where proposals are found technically equal, cost or price properly may become the determinative factor in making an award.

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6. Contracting agency properly downgraded proposal on the basis that the proposal did not describe health and/or fitness activities other than those listed in the solicitation, where the solicitation advised quoters that proposal should address the activities listed in the solicitation as well as other activities which offerors considered essential to an effective fitness program.

DECISION

New Dimensions in Exercise, Inc., protests the issuance of two purchase orders to Beyond the Body Wellness Management Services, under request for quotations (RFQ) Nos. PFAI-11-89 and PFC-11-89, issued under small purchase procedures by the Office of Administration Services and Management (OASAM), Department of Labor, San Francisco, California, for aerobics instruction and health and/or fitness consultation services, respectively.

We dismiss the protests in part and deny them in part.

On November 13, 1989, OASAM issued the RFQs to six companies along with a letter stating that the agency had allocated a maximum of \$15,400 for two positions: an aerobics instructor and a consultant. The agency requested offers by December 1. New Dimensions was the only company that responded timely. As a result, the contracting officer determined that the agency should solicit additional sources in order to ensure adequate competition. On December 11, the contracting officer telephoned New Dimensions' president and informed her that the agency had issued the RFQs to additional sources on December 4 and had set a December 18 response deadline.

The evaluation panel met on January 12, 1990, and determined that three firms which had submitted offers were in the competitive range: New Dimensions, Beyond the Body, and Beyond Aerobics. After further evaluating the firms' submissions, the panel rejected Beyond Aerobics on the basis of cost and, thus, narrowed the competitive range to two. Both firms indicated the hours of service they would provide for the amount of funds allocated to the contract; Beyond the Body offered approximately one-third more hours than New Dimensions. The panel then conducted oral interviews with the two companies during which they were given the opportunity to answer the panel's questions and concerns regarding their proposal and to expand on their proposed programs. Based upon the proposals and the oral interviews,

the evaluation panel assigned numerical scores to the offers. Beyond the Body received the higher scores and was recommended by the panel to the contracting officer for selection.^{1/} OASAM subsequently awarded the contracts to Beyond the Body. New Dimensions' protests to our Office followed.

New Dimensions contends that OASAM mishandled the procurements from the time the agency issued the RFQs to the time it awarded the contracts. New Dimensions first objects to the agency's issuance of the RFQs and claims that prior to the issuance, OASAM led New Dimensions to believe that an implied contract existed between New Dimensions and the agency, under which New Dimensions would continue teaching aerobics at the OASAM site; however, unlike the parties' past relationship, where Labor employees paid New Dimensions a fixed rate for each aerobics session, OASAM would provide funding for the courses. In this regard, New Dimensions claims that OASAM's fitness committee requested New Dimensions to disclose its hourly instruction rate; that OASAM requested funding based on that proprietary information; and that OASAM did not tell New Dimensions at that time that a solicitation for aerobics instruction would be issued. As a result, the protester requests reimbursement of the lost revenue it allegedly incurred by conducting aerobics courses between the time when the OASAM fitness committee first told the company that the agency planned to request funding for aerobics instruction and the date the contracts were awarded to Beyond the Body.

New Dimensions also questions the manner in which OASAM physically handled its quotations, asserting that a secretary at the agency placed the quotations in the contracting officer's mailbox which was located near the mailboxes of other employees and, therefore, did not properly safeguard the quotations as required by procurement regulations. Finally, New Dimensions argues that OASAM improperly extended the closing date for receipt of quotations and issued the solicitations to additional sources after the deadline for receipt had expired.

^{1/} With regard to aerobics instruction, Beyond the Body received 9.5 points out of 10 points; New Dimensions received 8.5 points. For the consultant services, Beyond the Body received 10 points and New Dimensions 7.5 points.

These contentions are untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals be filed prior to the closing date. Our Regulations, 4 C.F.R. § 21.2(a)(2), also provide that in cases other than those where alleged solicitation improprieties are challenged, protests must be filed not later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier.

New Dimensions received the RFQs on November 15, and thus should have raised any objections based on OASAM's use of New Dimensions' cost information and the existence of its alleged implied contract before the December 1 closing date for receipt of quotations. Because the firm did not protest until February 14, 1990, after the closing date, its protest regarding OASAM's issuance of the RFQs, allegedly resulting in the breach of its perceived implied contract and the agency's use of its propriety information, is untimely.

Similarly, New Dimensions' objection to the manner in which OASAM physically handled its quotations is untimely as well. On December 1, New Dimensions left its quotations with a secretary at OASAM after seeing her store the quotations in a public mailbox, and thus should have raised this objection no later than 10 working days after observing this action. In any event, absent any allegation or evidence to show otherwise, we fail to see how the protester was prejudiced by the storage method that OASAM used.

Finally, New Dimensions' contention that OASAM improperly solicited additional sources after the original closing date should have been lodged within 10 working days of the firm's December 11 notification from OASAM that the agency had, in fact, solicited three more sources on December 4. Again, however, New Dimensions elected to participate in the procurement and filed this protest on February 14, substantially more than 10 working days after it was aware of the reissuance, only upon learning that it was not the successful quoter. Hence, this allegation is also untimely and will not be considered.

New Dimensions also alleges that due to the awardee's lack of adequate staffing, the contractor only teaches aerobics for 1 hour per day rather than for 1-1/2 hours as required by the solicitation. Whether a contractor actually performs

in accordance with the solicitation's requirements is a matter of contract administration that is the responsibility of the contracting agency. Louisiana Found. for Medical Care, B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451. Consequently, where, as here, a protester raises a contract administration issue the matter is not for resolution under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1). Accordingly, we will not consider this protest allegation.

New Dimensions further contends that the agency improperly evaluated the awardee's aerobics instruction proposal. In this regard, New Dimensions asserts that the agency did not sufficiently downgrade the awardee's proposed staffing because the awardee proposed only one person to staff the position, rather than several instructors as the protester proposed.

It is not the function of our Office to evaluate proposals de novo; rather, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Data Control/North, Inc., B-233628.4, Apr. 5, 1989, 89-1 CPD ¶ 354. A protester's disagreement with the agency's judgment is itself not sufficient to establish that the agency's evaluation was unreasonable. VGS, Inc., B-233116, Jan. 25, 1989, 89-1 CPD ¶ 83.

The protester's argument that the agency overlooked alleged staffing inadequacies in the awardee's aerobics instruction proposal--based on an insufficient number of proposed instructors--is not supported by the record. While the agency did include staffing as an evaluation factor, the RFQ did not specify any minimum acceptable staff size. Moreover, the solicitation requested proposals offering three advanced aerobics courses per week and two beginner courses per week. Since there was no risk that--due to the scheduling of concurrent courses--the awardee's proposed instructor would not be able to teach both courses, we have no basis to question the agency's allocation of 1.5 points to the awardee in this area out of the maximum 2 points.

New Dimensions also argues that to the extent the agency evaluated its aerobics instruction plan, the agency has poorly supported the evaluation scores assigned to New Dimensions in two areas--the proposed program description area and the related education, training, experience, and references areas--because the agency did not delineate the perceived weaknesses in New Dimensions' proposal that

caused the agency to downgrade its scores in these areas. While the agency downgraded New Dimensions' proposal from 10 maximum points to 8.5 points--resulting in a "very good" adjectival rating--and downgraded the awardee's proposal to 9.5--resulting in an "excellent" adjectival rating--the agency states that these proposals were considered equal in terms of the proposed quality of instruction but unequal in terms of quantity because the awardee proposed approximately one-third more hours of weekly aerobics instruction than the protester.

In view of the agency determination that the aerobics instruction proposals were equal technically, and our finding that the agency reasonably evaluated the awardee's proposed instructional staffing, even if our Office found--for the sake of argument--that the agency unreasonably downgraded the protester's proposal, the proposals would remain technically equal because the difference in the scoring would decrease to one-half of 1 point. Where, as here, proposals are found technically equal, cost or price may become the determinative factor in making an award. Merdan Group, Inc., B-231880.3, Feb. 28, 1989, 89-1 CPD ¶ 210. For the same cost (\$15,400) the awardee proposed 7-1/2 hours of weekly aerobics instructions, in conformance with the solicitation, and the protester proposed 4-1/2 hours of weekly aerobics instruction. Consequently, we have no basis to object to the award.

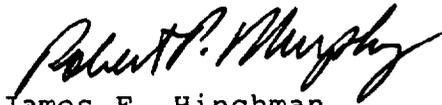
Regarding New Dimensions' proposal for consultant services, the protester contends that the agency improperly downgraded its proposal because the agency considered a factor which was not stated as an evaluation criterion in the RFQ. Specifically, the evaluation panel downgraded New Dimensions' proposal did not describe any health and/or fitness activities other than those listed in the RFQ. We have no basis to object to the agency's evaluation since, contrary to the protester's suggestion, the solicitation advised quoters that proposals should address their capabilities in accomplishing the responsibilities listed in the RFQ as well as any additional activities considered essential to an effective fitness program.

New Dimensions also challenges the agency's adherence to standards of ethics while conducting these procurements. Specifically, the protester claims that a member of the fitness committee sat on the interview panel, and that her participation was in some unspecified way improper. Even

assuming the manager sat on the interview panel,^{2/} such participation, by itself, is in no way unethical or otherwise improper. Moreover, even though the protester maintains that the manager asked questions during the interviews, we have no basis to object to the manager's presence at the interviews where there is no allegation or evidence that her presence prejudiced the protester.

Finally, New Dimension requests reimbursement of the costs of preparing its proposals and its protest. However, since we dismiss the protests in part and find the remainder to be without merit, we deny the claim for costs. William B. Hackett & Assocs., Inc., B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46.

The protests are dismissed in part and denied in part.


for James F. Hinchman
General Counsel

^{2/} While the agency selected the manager to direct the procurement for aerobics instructor and fitness consultant on the basis that she is a contracting officer familiar with the physical fitness committee program, the agency denies that the manager was a panel member.